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NAVIGATING THE “IMPENETRABLE JUNGLE”¹: STATUTORY LIMITS ON WISCONSIN PUBLIC NUISANCE ACTIONS

I. INTRODUCTION

In June 2004, Wisconsin Attorney General Peg Lautenschlager announced a public nuisance lawsuit against William Zawistowski, a cranberry farmer in Sawyer County.² The lawsuit alleged that Zawistowski discharged fertilizers into Lac Courte Oreilles, the eighth largest natural lake in the state, polluting the lake and impairing its use for commerce and recreation.³

Some legislators and farm groups vocally disapproved of the lawsuit.⁴ Opponents to the suit argued that because Zawistowski had not violated any statutes or regulations, the State should not pursue a nuisance action against him.⁵ Moreover, the opponents were concerned

1. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 616 (5th ed. 1984) (“There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’ It has meant all things to all people . . .”).

2. Press Release, Att’y Gen.’s Office, Public Nuisance Lawsuit Against Sawyer County Cranberry Grower Over Alleged Lake Pollution (June 10, 2004) (on file with author), available at http://www.doj.state.wi.us/news/2004/nr061004_ENV.asp.

3. *Id.* After a two week trial, on April 5, 2006, the trial court ruled in favor of Zawistowski, finding that there was no public nuisance. State Bar of Wis., *Zawistowski Decision*, <http://www.wisbar.org/AM/Template.cfm?Section=Search&template=/CM/HTMLDisplay.cfm&ContentID=56990> (last visited August 21, 2006). The trial court found that Zawistowski was intentionally discharging fertilizers into the lake, thus increasing the number and size of plants and algae in the lake and interfering with the public’s ability to use the lake. *State v. Zawistowski*, No. 2004CV000075, slip op. at 35 (Wis. Cir. Ct. Sawyer Co. Apr. 5, 2006), available at <http://www.wisbar.org/AM/Template.cfm?Section=Search&template=/CM/HTMLDisplay.cfm&ContentID=56990>. Despite this, the court ultimately concluded that a nuisance did not exist because the adverse effects had not yet reached unreasonable levels. *Id.* However, the court indicated that “[a] public nuisance is essentially developing,” *id.* at 26, thus putting Zawistowski on notice that “should the interference reach unreasonable levels” the public would be in a position to intervene, *id.* at 36.

4. Anita Weier, *Bogged Down; Farm Groups Protest Cranberry Run-Off Suit*, CAP. TIMES (Madison, Wis.), Aug. 25, 2004, at 8D.

5. *Id.*; Editorial, *No Good Business Goes Unpunished; A Wisconsin Cranberry Grower Runs His Business the Way the Government Ordered—But Now the Government Is Suing Him for Following the Rules*, WIS. ST. J., Aug. 6, 2004, at A8 (“Cranberry growers—and operators of any business—ought to be assured that as long as they follow the regulations governing their industry, they ought to be free to conduct their business. They shouldn’t be judged nuisances according to standards apart from those regulations.”).

that the action threatened Wisconsin's Right to Farm Law,⁶ which was enacted to protect farmers from nuisance lawsuits.⁷ The Attorney General's office defended the public nuisance action as appropriate under the common law.⁸ Indeed, the Attorney General asserted that the action was the "only enforcement option" available to "protect the public's rights in [Wisconsin's] state[] waters."⁹

In response, lawmakers introduced two bills during the 2005–2006 legislative session that would have limited public nuisance actions.¹⁰ First, Assembly Bill 278, which was introduced in March 2005, would have prevented the state, counties, cities, villages, and towns from bringing a public nuisance action where "the activity, use, or practice alleged to be a nuisance is not in violation of any statute, rule, permit, approval, or local ordinance or regulation."¹¹ Moreover, the bill contained a provision to award litigation expenses to defendants in public nuisance actions where "the court finds that the defendant's activity, use, or practice that was alleged to be a public nuisance was not a public nuisance."¹² The bill was introduced to "[l]imit the ability of the Attorney General and local units of government to bring public nuisance suits against businesses that are in full compliance with applicable laws."¹³ Testifying before the Assembly Judiciary Committee, the Attorney General stated that the "bill turns public nuisance law on its head by putting conduct which has long been illegal at common law above the law."¹⁴

6. WIS. STAT. § 823.08 (2003–2004).

7. Weier, *supra* note 4.

8. *Id.*

9. Peg Lautenschlager, Letter to the Editor, *Cranberry Lawsuit; Understand State's Role in Protecting Resources*, MILWAUKEE J. SENTINEL, July 5, 2004, at 12A (responding to a *Milwaukee Journal Sentinel* editorial that questioned, "why should farmers who comply with state farming regulations and acceptable farming practices be sued by the Department of Justice if other state agencies haven't complained?" Editorial, *Cranberry Questions*, MILWAUKEE J. SENTINEL, June 28, 2004, at 12A).

10. See Assemb. B. 278, 97th Leg., Reg. Sess. (Wis. 2005); S.B. 425, 97th Leg., Reg. Sess. (Wis. 2005).

11. Wis. Assemb. B. 278. An amendment proposed in October 2005 would have limited only the State from bringing such actions. Assemb. B. 278, S. Amend. 1, 97th Leg., Reg. Sess. (Wis. 2005).

12. Wis. Assemb. B. 278.

13. Press Release, Wis. State Sen. Joe Leibham, Keeping Wisconsin Open for Business: Lawmakers Unveil Jobs Act Part Two (Mar. 31, 2005) (on file with author), available at <http://www.legis.state.wi.us/senate/sen09/news/Press/2005/pr2005-025.htm>.

14. David Callender, *Nuisance Law Vital, AG Says; Lautenschlager 'Appalled' by GOP Plan to Eliminate It*, CAP. TIMES (Madison, Wis.), Apr. 1, 2005, at 1A.

Second, Senator Dave Zien and Representative Scott Suder introduced Senate Bill 425 in November 2005.¹⁵ Dubbed the "Fairness in Litigation Act," the bill's objective was to "protect private citizens against frivolous and unfair lawsuits brought forth by an Attorney General" and "to shield Wisconsin citizens and businesses against unfair lawsuits."¹⁶ Like the prohibition in Assembly Bill 278 of nuisance actions not in violation of statute,¹⁷ Senate Bill 425 would have prevented actions "by the attorney general if the activity, use, or practice alleged to be a nuisance is not in violation of any statute, rule, order, permit, approval, or local ordinance or regulation."¹⁸ Also, as in Assembly Bill 278, Senate Bill 425 would have awarded litigation costs to defendants in nuisance actions where the "activity . . . alleged to be a public nuisance was not a public nuisance."¹⁹ Criticizing the bill, Attorney General Lautenschlager's office stated that "[p]ublic nuisance actions to protect property owners would be frustrated," and argued that "[d]espite the bill's authors' claims to the contrary, not a single nuisance lawsuit brought by the Attorney General has been found to be frivolous."²⁰ Moreover, the Attorney General argued that "[a]doption of any part of this bill would do irreparable damage to the public's safety and well being."²¹

Currently, Wisconsin public nuisance law has both statutory²² and common law elements.²³ Statutes define who may pursue public nuisance cases and what remedies are available in public nuisance

15. Wis. S.B. 425.

16. Press Release, Sen. Dave Zien & Rep. Scott Suder, Zien/Suder Announce Fairness in Litigation Act (Oct. 6, 2005) (on file with author), *available at* <http://www.legis.state.wi.us/senate/sen23/news/Press/2005/pr2005-031.htm>.

17. Wis. Assemb. B. 278.

18. Wis. S.B. 425.

19. *Id.*

20. Press Release, Att'y Gen.'s Office, Zien/Suder Bill Deprives Citizens of "Litigation Fairness" (Oct. 20, 2005) (on file with author), *available at* http://www.doj.state.wi.us/news/2005/nr102005_PL-2.asp.

21. *Id.*

22. *See generally* WIS. STAT. ch. 823 (2003–2004) (containing statutes pertaining to public nuisances).

23. *See Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶¶ 24–30, 277 Wis. 2d 635, ¶¶ 24–30, 691 N.W.2d 658, ¶¶ 24–30 (discussing the nature and elements of a public nuisance); *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 2002 WI 80, ¶ 21 & n.17, 254 Wis. 2d 77, ¶ 21 & n.17, 646 N.W.2d 777, ¶ 21 & n.17 (defining public nuisance and tracing the historical development of public nuisance law); *State v. Quality Egg Farm, Inc.*, 104 Wis. 2d 506, 514–21, 311 N.W.2d 650, 655–58 (1981) (providing a general overview of public nuisance law in Wisconsin).

actions.²⁴ Additionally, certain statutes, administrative regulations, and local ordinances define specific conduct that constitutes a public nuisance.²⁵ However, the definition of activity that constitutes a public nuisance quite broadly includes behavior that is “an unreasonable interference with a right common to the general public.”²⁶ Thus, under current Wisconsin law, behavior that is not expressly prohibited by statute, regulation, or ordinance may be considered a public nuisance.²⁷

The changes proposed in Assembly Bill 278 and Senate Bill 425 would have barred the State from bringing common law public nuisance actions.²⁸ Although neither bill was enacted into law by the end of the 2005–2006 Regular Session,²⁹ the debate surrounding what controls, if any, the Wisconsin legislature can and should place on the State’s ability to pursue public nuisance actions is likely to continue for some time to come.

This Comment analyzes the impact of limiting public nuisance actions brought by the State to only those activities expressly prohibited by statute or ordinance, and it assesses whether such limits are appropriate and effective or whether there are other, narrower alternatives that could adequately control State public nuisance actions. To provide context for the arguments that follow, Part II provides a brief overview of the evolution of public nuisance law and current public nuisance law in Wisconsin. Part III compares current statutory limits on public nuisance actions in Wisconsin to those in other states. Part IV discusses the modifications to Wisconsin public nuisance law that were proposed in Assembly Bill 278 and Senate Bill 425, assesses the bills’ intent and rationale, and analyzes the bills’ benefits and drawbacks. Finally, to remedy the drawbacks of Assembly Bill 278 and Senate Bill 425, Part V offers an alternative proposal that would achieve the same legislative intent as these bills without such far-reaching ramifications. Specifically, Part V proposes legislation to (1) adopt a statutory

24. See generally WIS. STAT. ch. 823 (containing statutes pertaining to public nuisances).

25. See *infra* Part II.C.

26. *Physicians Plus Ins. Corp.*, 2002 WI 80, ¶ 21 n.15, 254 Wis. 2d 77, ¶ 21 n.15, 646 N.W.2d 777, ¶ 21 n.15 (quoting RESTATEMENT (SECOND) OF TORTS § 821B (1979)).

27. See *infra* text accompanying notes 76–83.

28. See *infra* Part IV.C.1.

29. See History of Assemb. B. 278, 97th Leg., Reg. Sess. (Wis. 2005), available at <http://www.legis.state.wi.us/2005/data/AB278hst.html>; History of S.B. 425, 97th Leg., Reg. Sess. (Wis. 2005), available at <http://www.legis.state.wi.us/2005/data/sb425hst.html>. The last general business floorperiod for the 2005–2006 Wisconsin Legislature ended on May 4, 2006. S.J. Res. 1, 97th Leg., Reg. Sess. (Wis. 2005) (listing bills and resolutions adversely disposed of due to the end of the last general business floorperiod).

definition of a public nuisance to clarify what activities constitute a public nuisance, (2) bar nuisance actions for activities expressly permitted by statute or regulation, and (3) clarify what protections the Right to Farm Law³⁰ provides to agricultural operations against public nuisance actions.

II. AN OVERVIEW OF PUBLIC NUISANCE LAW IN WISCONSIN

Nuisance law has been described as an “impenetrable jungle,”³¹ “a sort of legal garbage can,”³² and an area of law that is “difficult to pin down”³³ and “often obfuscated by broad and confusing language and court dicta.”³⁴ Indeed, the term “nuisance” itself is said to be “incapable of an exact and exhaustive definition which will fit all cases.”³⁵

In light of the complex and confusing nature of nuisance law, to effectively assess the impact of the legislation proposed in Assembly Bill 278 and Senate Bill 425 it is important to have a basic understanding of the evolution of public nuisance law and current principles of public nuisance law in Wisconsin. Thus, what follows in this Part is a brief overview of public nuisance law, with particular focus on Wisconsin law.

A. Common Law Origins of Public Nuisance

Public nuisance law originated in thirteenth century England with cases involving purprestures, defined as “encroachments upon the royal domain or the king’s highway.”³⁶ Such acts were considered a crime because they infringed upon the rights of the crown.³⁷ The concept later expanded to include a variety of infringements on public rights,

30. WIS. STAT. § 823.08 (2003–2004).

31. KEETON ET AL., *supra* note 1, § 86, at 616.

32. William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942) (“‘Nuisance,’ unhappily, has been a sort of legal garbage can. The word has been used to designate anything from an alarming advertisement to a cockroach baked in a pie.” (footnotes omitted)).

33. STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 20:1, at 73 (1990).

34. *Id.*

35. *Lindemeyer v. City of Milwaukee*, 241 Wis. 637, 640, 6 N.W.2d 653, 655 (1942); *see also Schiro v. Oriental Realty Co.*, 272 Wis. 537, 545, 76 N.W.2d 355, 359 (1956) (“It would be difficult to find a term which has been the subject of more mystifying confusion of utterance in the reports and texts.”).

36. William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 998 (1966) [hereinafter Prosser, *Private Action for Public Nuisance*]; *see also* L. Mark Walker & Dale E. Cottingham, *An Abridged Primer on the Law of Public Nuisance*, 30 TULSA L.J. 355, 356–57 (1994) (providing a brief overview of the history of public nuisance).

37. Prosser, *Private Action for Public Nuisance*, *supra* note 36, at 998.

including “obstructed highways, lotteries, unlicensed stage-plays, common scolds, and a host of other rag ends of the law.”³⁸ Public nuisance law eventually evolved “to include any ‘act not warranted by law, or an omission to discharge a legal duty, which inconveniences the public in the exercise of rights common to all Her Majesty’s subjects.’”³⁹

In the sixteenth century, public nuisance was recognized as a tort in addition to being a crime.⁴⁰ In a 1536 case, recovery in tort for a public nuisance was allowed where a plaintiff could show special damage not held in common with the public.⁴¹

B. Modern Public Nuisance Law in the United States

These early concepts of public nuisance law have persisted over time. Today, one generally accepted definition of nuisance⁴² is “a condition or activity which unduly interferes with the use of land or of a public place.”⁴³ There are two categories of nuisances: private nuisances and public nuisances.⁴⁴ While a private nuisance is defined as “[c]onduct which interferes solely with the use of a relatively small area of private land,” a public nuisance is any “[c]onduct which interferes with the use of a public place or with the activities of an entire community.”⁴⁵ Public nuisances are considered crimes at common law,⁴⁶ and where there is a special harm to an individual, a private action in tort may arise.⁴⁷

Most states have enacted legislation covering public nuisances.⁴⁸ Such public nuisance statutes are typically very broad and general in nature and have been interpreted to prohibit anything that would have been a public nuisance at common law.⁴⁹ In general, states also have

38. *Id.* (quoting F.H. Newark, *The Boundaries of Nuisance*, 65 LAW Q. REV. 480, 482 (1949)).

39. *Id.* at 998–99 (quoting JAMES F. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 105 (F.B. Rothman & Co. 1985) (2d ed. 1890)).

40. KEETON ET AL., *supra* note 1, § 90, at 646.

41. *Id.*

42. See 58 AM. JUR. 2D *Nuisances* § 1 (2002).

43. Warren A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984, 984 (1952), *quoted in* *Schiro v. Oriental Realty Co.*, 272 Wis. 537, 546, 76 N.W.2d 355, 359 (1956).

44. KEETON ET AL., *supra* note 1, § 86, at 618.

45. Seavey, *supra* note 43, at 984–85, *quoted in* *Schiro*, 272 Wis. at 546, 76 N.W.2d at 359.

46. KEETON ET AL., *supra* note 1, § 90, at 645.

47. 58 AM. JUR. 2D *Nuisances* § 420 (2002).

48. KEETON ET AL., *supra* note 1, § 90, at 645–46.

49. *Id.* at 646. In Wisconsin, as in other states, common law nuisance theories provide an alternative cause of action where statutory remedies are inadequate. See, e.g., *Physicians*

statutes and regulations that declare specific things or activities to be public nuisances.⁵⁰

C. Wisconsin Public Nuisance Law

Wisconsin has recognized public nuisance as a cause of action since at least 1849.⁵¹ Today, Wisconsin public nuisance law is governed by both statutes⁵² and the common law.⁵³ In addition, local ordinances may declare certain activities to be public nuisances.⁵⁴ Moreover, a number of administrative regulations exist that, if violated, may create a public nuisance.⁵⁵

Chapter 823 of the Wisconsin Statutes is devoted to nuisance law.⁵⁶ Section 823.01 grants jurisdiction over public nuisances to individuals, counties, cities, villages, and towns when special injuries are suffered.⁵⁷ Section 823.02 provides that "action[s] to enjoin a public nuisance may be commenced and prosecuted in the name of the state, either by the attorney general[,] or by individuals, sewerage commissions, or counties with leave from the court."⁵⁸ Moreover, cities, villages, towns, and metropolitan sewerage districts may commence public nuisance actions in the name of the municipality or sewerage district without

Plus Ins. Corp. v. Midwest Mut. Ins. Co., 2002 WI 80, 254 Wis. 2d 77, 646 N.W.2d 777 (public nuisance action against a landowner, a town, and a county for tree obstructing view of stop sign); City of Milwaukee v. NL Indus., Inc., 2005 WI App 7, 278 Wis. 2d 313, 691 N.W.2d 888 (public nuisance action against paint manufacturers for childhood lead paint poisoning). For a discussion of applying public nuisance law to the environment, see Jason J. Czarnecki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B.C. ENVTL. AFF. L. REV. (forthcoming 2006).

50. KEETON ET AL., *supra* note 1, § 90, at 645–46.

51. See *Luning v. State*, 2 Pin. 215 (Wis. 1849) (holding that no immunity against a public nuisance action existed for a defendant who erected a mill-dam in accordance with regulations).

52. E.g., WIS. STAT. ch. 823 (2003–2004).

53. See *infra* text accompanying notes 76–83.

54. See, e.g., CITY OF MILWAUKEE, WIS., CODE OF ORDINANCES ch. 80 (2005), available at <http://cc-codenew.milwaukee.gov/code/volume1/ch80.pdf>; TOWN OF DELAFIELD, WIS., ZONING ORDINANCE ch. 10 (2002), available at <http://www.townofdelafield.org/documents/chapter10.pdf>; VILLAGE OF HARTLAND, WIS., MUNICIPAL CODE ch. 62 (2005), available at <http://www.municode.com/resources/gateway.asp?sid=49&pid=13361>.

55. See, e.g., *infra* notes 72–75.

56. WIS. STAT. ch. 823 (2003–2004).

57. *Id.* § 823.01.

58. *Id.* § 823.02.

leave from the court.⁵⁹ Remedies include abatement of the nuisance in addition to damages and costs.⁶⁰

Some statutes declare certain activities to be public nuisances. For example, prostitution houses,⁶¹ drug or criminal gang houses,⁶² gambling places,⁶³ dilapidated buildings,⁶⁴ and dilapidated wharves and piers in navigable waters⁶⁵ are all nuisances under Wisconsin statutes. In addition, repeated violations of municipal ordinances relating to combustible materials are public nuisances,⁶⁶ as are violations of ordinances enacted pursuant to section 66.0415(1) of the Wisconsin Statutes,⁶⁷ which permits cities and villages to regulate or prohibit “any nauseous, offensive or unwholesome business.”⁶⁸

In addition to the statutes in chapter 823, other statutes,⁶⁹ administrative regulations,⁷⁰ and local ordinances⁷¹ may declare that certain activities constitute public nuisances. For example, while there are no administrative code regulations that govern public nuisance law in general, regulations in the administrative code that cover specific areas, such as wharves and piers,⁷² hunting,⁷³ sewers,⁷⁴ and livestock,⁷⁵

59. *Id.*

60. *Id.* § 823.03.

61. *Id.* § 823.09.

62. *Id.* § 823.113.

63. *Id.* § 823.20.

64. *Id.* § 823.21.

65. *Id.* § 823.215.

66. *Id.* § 823.065.

67. *Id.* § 823.07.

68. *Id.* § 66.0415.

69. *E.g.*, WIS. STAT. § 29.404 (2003–2004) (declaring fish shanties and similar structures that fall through ice to be public nuisances); WIS. STAT. § 29.927 (2003–2004) (declaring a variety of activities and conditions related to hunting and fishing to be public nuisances); WIS. STAT. § 30.294 (2003–2004) (declaring that every violation of Chapter 30 of the Wisconsin Statutes, which governs navigable waters, harbors, and navigation, is a public nuisance).

70. *E.g.*, *infra* notes 72–75.

71. *See* CITY OF MILWAUKEE, WIS., CODE OF ORDINANCES ch. 80 (2005), *available at* <http://cc-codenew.milwaukee.gov/code/volume1/ch80.pdf>; TOWN OF DELAFIELD, WIS., ZONING ORDINANCE ch. 10 (2002), *available at* <http://www.townofdelafield.org/documents/chapter10.pdf>; VILLAGE OF HARTLAND, WIS., MUNICIPAL CODE ch. 62 (2005), *available at* <http://www.municode.com/resources/gateway.asp?sid=49&pid=13361>.

72. *See* WIS. ADMIN. CODE NR § 326 (2005). The rules in NR § 326 are intended “to provide consistency in the application of . . . [section] 30.13 [of the Wisconsin Statutes] to the construction of piers, boat shelters, . . . and similar structures on . . . navigable waterways.” *Id.* § 326.01. Violations of section 30.13(5m)(a)(2) of the Wisconsin statutes are considered to be public nuisances under section 823.215. WIS. STAT. §§ 30.13(5m)(a)(2), 823.215 (2003–2004).

73. *See, e.g.*, WIS. ADMIN. CODE NR § 12 (2005) (regulating wildlife damage and

may be relevant in assessing whether certain activities in these areas constitute a public nuisance.

While statutes, regulations, and ordinances cover a number of aspects of nuisance law, in no way do they completely or exclusively state the law of public nuisance in Wisconsin. For example, nowhere in chapter 823 is a nuisance defined.⁷⁶ Thus, courts rely on common law definitions and principles when determining what constitutes a public nuisance.

Indeed, Wisconsin courts have relied upon the definition of public nuisance offered in *Schiro v. Oriental Realty Co.*, where the court described a public nuisance as “[c]onduct which interferes with the use of a public place or with the activities of an entire community.”⁷⁷ Moreover, Wisconsin courts have looked to the Restatement (Second) of Torts⁷⁸ (“Restatement”) when interpreting public nuisance law.⁷⁹ For example, in *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, the court turned to section 821B of the Restatement to distinguish a public nuisance from a private nuisance.⁸⁰ Similarly, the court in *Physicians Plus Insurance Corp. v. Midwest Mutual Insurance Co.* relied on the Restatement in its conclusion that “a public nuisance is not defined by the number of people involved.”⁸¹

Additionally, Wisconsin statutes do not provide an exhaustive list of activities or conditions that constitute a public nuisance. Indeed, courts will look at a variety of criteria in determining whether an activity or condition is a public nuisance, including the following:

The number of people affected . . . [;] the location of the

nuisance control and abatement).

74. See WIS. ADMIN. CODE NR § 110 (2001) (regulating sewerage systems).

75. See, e.g., WIS. ADMIN. CODE ATCP §§ 11.72, 12.08 (2005) (prohibiting parking, storing, or depositing animal remains or waste where a health hazard or public nuisance is created).

76. See WIS. STAT. ch. 823 (2003–2004).

77. 272 Wis. 537, 546, 76 N.W.2d 355, 359 (1956) (quoting Seavey, *supra* note 43, at 984), cited in *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶ 30, 277 Wis. 2d 635, ¶ 30, 691 N.W.2d 658, ¶ 30; *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 2002 WI 80, ¶ 2, 254 Wis. 2d 77, ¶ 2, 646 N.W.2d 777, ¶ 2.

78. RESTATEMENT (SECOND) OF TORTS §§ 821B, 821C (1979).

79. See *Milwaukee Metro. Sewerage Dist.*, 2005 WI 8, ¶ 25 n.4, 277 Wis. 2d 635, ¶ 25 n.4, 691 N.W.2d 658, ¶ 25 n.4 (“Wisconsin’s definition of public nuisance . . . comports with the Restatement (Second) of Torts § 821B.”).

80. *Id.* ¶¶ 24–30, 277 Wis. 2d 635, ¶¶ 24–30, 691 N.W.2d 658, ¶¶ 24–30.

81. *Physicians Plus Ins. Corp.*, 2002 WI 80, ¶ 21 n.16, 254 Wis. 2d 77, ¶ 21 n.16, 646 N.W.2d 777, ¶ 21 n.16.

operation or property; the degree or character of the injury inflicted or the right impinged upon; the reasonableness of the use of the property; the nature of the business maintained; the proximity of dwellings to the business; and the nature of the surrounding neighborhood or community.⁸²

Thus, under current Wisconsin law, an act need not be expressly prohibited by statute, regulation, or ordinance to be considered a public nuisance.⁸³

In summary, Wisconsin public nuisance law is rooted in common law principles that have evolved since the thirteenth century.⁸⁴ Like many states,⁸⁵ Wisconsin has enacted statutes that govern public nuisances, but it also relies upon the common law in interpreting whether certain conditions or acts constitute a public nuisance.⁸⁶ Thus, in Wisconsin, even where an act or condition is not expressly prohibited by statute, ordinance, or regulation, it may still constitute a public nuisance under common law principles.⁸⁷

III. LEGISLATIVE LIMITS ON PUBLIC NUISANCES IN WISCONSIN AND OTHER STATES

As part of their police power, states have the authority to prevent or abate nuisances.⁸⁸ In general, legislatures have the authority to define nuisances.⁸⁹ Included in this authority is the ability to “regulat[e] or prohibit[] acts or things which may become nuisances.”⁹⁰ The scope of the legislature’s authority may include regulations on “proposed uses of property, or acts or things which may injuriously affect the public health or morals.”⁹¹

82. *State v. Quality Egg Farm, Inc.*, 104 Wis. 2d 506, 520–21, 311 N.W.2d 650, 657–58 (1981).

83. *See Quality Egg Farm, Inc.*, 104 Wis. 2d at 515–16, 311 N.W.2d at 655 (“In determining whether there is a public nuisance, . . . [t]he lawfulness of the business or property does not control These are matters to consider on the ultimate issue of lack of enjoyment of life and property”).

84. *See supra* Part II.A.

85. *See supra* Part II.B.

86. *See supra* Part II.C.

87. *See supra* Part II.C.

88. 58 AM. JUR. 2D *Nuisances* § 48 (2002).

89. *Id.* § 50.

90. *Id.*

91. *Id.*

In exercising this power, legislatures have broad discretion to declare things or acts to be nuisances regardless of whether they were nuisances at common law.⁹² However, in *City of Chicago v. Beretta U.S.A. Corp.*, the Supreme Court of Illinois determined that "the codification of certain common law nuisances . . . and the legislative declaration that certain other conditions constitute nuisances does not exclude common law nuisances not codified . . . from being classed as public nuisances."⁹³

In addition, "[j]ust as the legislature, within its constitutional limitations, may declare particular conduct . . . to be a nuisance, it may authorize that which would otherwise be a nuisance."⁹⁴ This Part of the Comment explores current legislative limits on public and private nuisance actions in Wisconsin and examines limits on public nuisances that exist in other states.

A. Current Legislative Limits on Public Nuisance Actions in Wisconsin

While statutory limits exist that significantly restrict private nuisance actions in Wisconsin, current limits on public nuisance actions are minimal. For example, Wisconsin's Right to Farm Law greatly limits private nuisance actions against agricultural operations but does not provide similar restrictions against public nuisance actions.⁹⁵ Moreover, with few exceptions, the attorney general has broad authority to bring public nuisance actions in Wisconsin.⁹⁶

To provide context for the analysis and recommendations given in Parts IV and V of this Comment regarding potential statutory limits on public nuisance actions, what follows in this Subpart is a discussion of statutory limits on nuisance actions currently in effect in Wisconsin, including (1) statutory provisions for who can pursue public nuisance actions, (2) provisions for costs and attorney's fees, and (3) provisions in Wisconsin's Right to Farm Law that limit nuisance actions against agricultural operations.

1. Statutory Provisions Regarding Who May Bring Public Nuisance Actions

Sections 823.01 and 823.02 of the Wisconsin Statutes contain

92. *Id.* § 49.

93. 821 N.E.2d 1099, 1120 (Ill. 2004).

94. WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS § 91, at 606 (4th ed. 1971), *quoted in* Walker & Cottingham, *supra* note 36, at 371.

95. *See infra* Part III.A.3.

96. *See infra* Part III.A.1.

provisions on who may bring actions for public nuisances. Section 823.01 of the Wisconsin Statutes identifies who has jurisdiction to maintain an action for a public nuisance.⁹⁷ The statute indicates that “[a]ny person, county, city, village or town” may maintain a public nuisance action to recover damages or abate a nuisance where there are special and particular injuries suffered by the complainant.⁹⁸ Counties, cities, villages, and towns need not sustain injury to their own property to file a suit.⁹⁹ Indeed, in *Town of East Troy v. Soo Line Railroad Co.*, the court held that a town’s standing to sue for damages caused by an alleged public nuisance was not dependent on a special injury to the town’s own property.¹⁰⁰

Section 823.02 identifies who may file actions in the name of the State to enjoin public nuisances.¹⁰¹ Actions “may be commenced . . . in the name of the state . . . by the attorney general on information obtained by the department of justice.”¹⁰² Additionally, actions in the name of the State may be commenced on the relation of private individuals, sewerage commissions, or counties upon obtaining leave from the court.¹⁰³ Thus, actions in the name of the State can be filed by parties other than the attorney general only with leave from the court.¹⁰⁴ In contrast, the attorney general is not required to have such approval to commence a public nuisance action on behalf of the State.¹⁰⁵

While the attorney general has broad authority under sections 823.01 and 823.02 to commence public nuisance actions, other statutes may limit this authority. For example, in *State v. City of Oak Creek*, the court held that the attorney general lacked standing to bring a public nuisance

97. WIS. STAT. § 823.01 (2003–2004).

98. *Id.*

99. *See* *Town of E. Troy v. Soo Line R.R.*, 653 F.2d 1123, 1126–32 (7th Cir. 1980).

100. *Id.*

101. WIS. STAT. § 823.02 (2003–2004).

102. *Id.*

103. *Id.* *See, e.g., State ex rel. Priegel v. N. States Power Co.*, 242 Wis. 345, 349, 8 N.W.2d 350, 352 (1943) (noting that a game warden obtained leave of the court to bring an action in the name of the State to enjoin a public nuisance); *State ex rel. Regez v. Blumer*, 236 Wis. 129, 130, 294 N.W. 491, 491 (1940) (noting that the District Attorney of Green County obtained leave of court to bring action in the name of State to abate a public nuisance). Cities, villages, towns, and sewerage districts may commence public nuisance actions in their own name without leave of court. § 823.02.

104. *See id.* § 823.02.

105. *See id.* In an unpublished opinion, the Wisconsin Court of Appeals held that the attorney general was not required to obtain leave of court prior to commencing a public nuisance action under section 823.02. *State v. Baumann*, No. 92-3198, 1995 Wisc. App. LEXIS 261, at *26–27 (Wis. Ct. App. Feb. 28, 1995).

action to require the city to remove a concrete channel from a creek because of a statute overriding this authority.¹⁰⁶ Section 30.056 of the Wisconsin Statutes states that “[n]otwithstanding . . . [section] 30.294, the city of Oak Creek may not be required to remove any structure or concrete . . . that was placed in Crayfish Creek . . . before June 1, 1991, and may continue to maintain the structure . . . [or] concrete”¹⁰⁷ The *Oak Creek* court found that the effect of section 30.056 is to override section 30.294 of the Wisconsin Statutes,¹⁰⁸ which provides that violations of Chapter 30 of the Wisconsin Statutes are public nuisances and “may be prohibited by injunction and may be abated by legal action brought by any person.”¹⁰⁹ While the attorney general argued in *Oak Creek* that sections 30.294, 823.01 and 823.02 of the Wisconsin Statutes granted him the necessary standing to bring a nuisance claim, the court was not persuaded, finding that these statutes failed to provide the attorney general specific authority to sue the City of Oak Creek because of the negating effect of section 30.056.¹¹⁰ Whether such a limit on the attorney general’s (or any person’s) standing to commence a public nuisance action is constitutional remains an open question, as the *Oak Creek* court held that the attorney general could not challenge the constitutionality of section 30.056.¹¹¹

In sum, current Wisconsin law provides wide latitude on who can bring public nuisance actions. Provided that the “special injury” requirement is met, any person, county, or municipality may bring a suit under section 823.01.¹¹² The attorney general has broad authority to commence public nuisance suits in the name of the State under section 823.02.¹¹³ Moreover, with leave from the court, private individuals and other government entities may bring suits in the name of the State as

106. 2000 WI 9, ¶ 1, 232 Wis. 2d 612, ¶ 1, 605 N.W.2d 526, ¶ 1.

107. WIS. STAT. § 30.056 (2003–2004).

108. See *Oak Creek*, 2000 WI 9, ¶ 5, 232 Wis. 2d 612, ¶ 5, 605 N.W.2d 526, ¶ 5 (noting that in 1996 section 30.055 was repealed and replaced with section 30.056 and section 30.056 included the relevant language of section 30.055).

109. WIS. STAT. § 30.294 (2003–2004).

110. *Oak Creek*, 2000 WI 9, ¶ 36, 232 Wis. 2d 612, ¶ 36, 605 N.W.2d 526, ¶ 36.

111. *Id.* ¶ 1, 232 Wis. 2d 612, ¶ 1, 605 N.W.2d 526, ¶ 1. *Oak Creek* limits the attorney general’s power to challenge the constitutionality of statutes, thus placing a greater burden on the public to raise constitutional challenges to statutes such as section 30.056. Christa Oliver Westerberg, Note, *From Attorney General to Attorney Specific: How State v. City of Oak Creek Limited the Powers of Wisconsin’s Chief Legal Officer*, 2001 WIS. L. REV. 1207, 1247–49 (2001).

112. WIS. STAT. § 823.01 (2003–2004).

113. *Id.* § 823.02.

well.¹¹⁴ However, other statutory provisions, such as section 30.056, may limit the standing of the attorney general and others to bring public nuisance actions in specific situations.¹¹⁵

2. Statutory Provisions for Litigation Costs in Public Nuisance Actions

At present, Wisconsin law does not award costs to defendants in frivolous public nuisance actions brought by the State. Section 823.02 specifies that in public nuisance actions, “[t]he same rule as to liability for costs shall govern as in other actions brought by the state.”¹¹⁶ However, in Wisconsin, costs are not recoverable absent a statute authorizing them, particularly in cases involving the State or other governmental bodies.¹¹⁷

Because no provision in chapter 814 of the Wisconsin Statutes authorizes recovery of costs in cases brought by the State, it appears that defendants who prevail in public nuisance actions brought in the name of the State by the attorney general cannot recover costs. Indeed, while costs are recoverable in actions brought by Wisconsin counties and state agencies, they do not appear to be recoverable in actions brought in the name of the State by the attorney general. Section 814.23 of the Wisconsin Statutes provides that “[i]n all actions by or against a county . . . costs shall be awarded to the prevailing party as in actions between individuals.”¹¹⁸ Similarly, section 814.245 provides for costs in actions brought by state agencies against individuals and small businesses,¹¹⁹ but this statute appears to apply only where the state agency, and not the State, is the named party in the action.¹²⁰ Moreover, there is not a similar express provision for actions brought in the name of the State by the attorney general. Absent such an express provision, it appears that current Wisconsin law would bar recovery of costs in public nuisance actions brought by the attorney general in the name of the State.

114. *Id.*

115. WIS. STAT. § 30.056 (2003–2004).

116. *Id.* § 823.02.

117. *State ex rel. Korne v. Wolke*, 79 Wis. 2d 22, 25, 255 N.W.2d 446, 448 (1977); *City of Milwaukee v. Leschke*, 57 Wis. 2d 159, 161, 203 N.W.2d 669, 670–71 (1973) (“This court has consistently held that at common law costs were unknown, and that in this state costs are regulated exclusively by statute as a matter of legislative discretion. In the absence of a statute authorizing costs, they are not recoverable.” (citations omitted)).

118. WIS. STAT. § 814.23 (2003–2004).

119. *Id.* § 814.245.

120. *See, e.g., Sheely v. Wis. Dep’t of Health & Soc. Servs.*, 150 Wis. 2d 320, 442 N.W.2d 1 (1989) (awarding attorney fees and costs against a Wisconsin state agency).

3. Wisconsin's Right to Farm Law: Limiting Private Nuisance Actions Against Agricultural Practices

Wisconsin law currently includes special provisions to prevent nuisance actions against agricultural operations. Section 823.08 of the Wisconsin Statutes, commonly known as the "Right to Farm Law,"¹²¹ declares in its legislative purpose that "[t]he legislature believes that . . . the law should not hamper agricultural production or the use of modern agricultural technology."¹²² The Right to Farm Law's objective is "to legislatively lift the threat of nuisance lawsuits by neighbors if the agricultural operation produces odor, noise, water pollution, or other nuisance-type conditions."¹²³

The Right to Farm Law limits the scope of causes of action and the available remedies for nuisance actions against agricultural operations.¹²⁴ Specifically, the Right to Farm Law prevents nuisance actions against agricultural operations where the plaintiff "came to the nuisance"¹²⁵ and "[t]he agricultural use or agricultural practice does not present a substantial threat to public health or safety."¹²⁶ In addition, the statute awards litigation expenses to defendants in actions where the agricultural practice alleged as a nuisance is not found to be a nuisance.¹²⁷

When a nuisance is found against an agricultural operation, the Right to Farm Law limits available remedies. First, the relief awarded cannot substantially restrict the agricultural use or practice.¹²⁸ Second, if the court orders mitigation of the nuisance, the court must request suggestions for appropriate mitigation methods from "public agencies having expertise in agricultural matters" and the defendant must be given at least one year to implement the ordered actions.¹²⁹ Finally,

121. Andrew C. Hanson, *Brewing Land Use Conflicts: Wisconsin's Right to Farm Law*, WIS. LAW., Dec. 2002, at 10, 10.

122. WIS. STAT. § 823.08 (2003–2004).

123. Hanson, *supra* note 121, at 10.

124. § 823.08; Hanson, *supra* note 121, at 12.

125. Hanson, *supra* note 121, at 12; § 823.08(3)(a)(1) (stating that there is no nuisance where "[t]he agricultural use or agricultural practice alleged to be a nuisance is conducted on . . . land that was in agricultural use without substantial interruption" before the plaintiff's use of the allegedly impacted land).

126. § 823.08(3)(a)(2).

127. *Id.* § 823.08(4)(b).

128. *Id.* § 823.08(3)(b)(1).

129. *Id.* § 823.08(3)(b)(2)(a). Public agencies having such expertise include the Department of Natural Resources or the Department of Agriculture, Trade, and Consumer Protection. Hanson, *supra* note 121, at 13.

where mitigation is ordered, “the court may not order . . . any action[s] that substantially and adversely affect[] the economic viability of the agricultural use.”¹³⁰

The effect of the Right to Farm Law is that it significantly limits private nuisance actions against agricultural uses and practices.¹³¹ Indeed, one commentator has suggested that the statute appears to eliminate private nuisance actions against agricultural uses altogether.¹³² While in general private nuisance actions can be brought when there is “evidence of substantial and unreasonable interference with the use and enjoyment of [the plaintiff’s] property”; the Right to Farm Law requires plaintiffs bringing actions against agricultural operations to meet the additional hurdle that “the agricultural use poses a substantial threat to public health and safety.”¹³³ Thus, private nuisance actions against agricultural activities are substantially limited under the Right to Farm Law.

However, the scope of the Right to Farm Law does not appear to limit public nuisance actions against agricultural operations brought by individuals or by the State or municipalities.¹³⁴ Indeed, the statute permits actions where the agricultural activity or practice presents a substantial threat to public health and safety.¹³⁵ Because this is the standard that applies to public nuisance actions, the statute’s language appears to continue to allow public nuisance actions against agricultural operations.¹³⁶

In sum, current Wisconsin statutory law provides minimal restrictions on and protections against public nuisance actions. There is wide latitude on who may pursue public nuisance actions under sections 823.01 and 823.02. Moreover, defendants are unlikely to recover litigation costs in frivolous public nuisance actions brought by the State. Finally, although the state’s Right to Farm Law significantly limits

130. § 823.08(3)(b)(3).

131. Hanson, *supra* note 121, at 13, 60.

132. *Id.* at 60.

133. *Id.*

134. See WIS. LEGISLATIVE COUNCIL, LEGAL MEMORANDUM No. LM-2000-12, WISCONSIN’S RIGHT-TO-FARM LAW 2 (2000), available at http://www.legis.state.wi.us/lc/jlc00/LM_2000_12.pdf (“Section 823.08 . . . appears to apply only to litigation regarding private nuisances, although this is not expressly stated in the statute.”).

135. See § 823.08; see also Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 129–30, 146–47 (1983) (discussing safeguards to public health and safety in the Right to Farm Laws in Wisconsin and other states).

136. See WIS. LEGISLATIVE COUNCIL, *supra* note 134, at 2.

private nuisance actions against agricultural operations, it does not similarly limit public nuisance actions.

B. Legislative Limits on Nuisance Actions in Other States

While Wisconsin statutory law currently contains few restrictions on public nuisance actions, other states have enacted statutes that do impose limits. Among the ways in which state legislatures can limit public nuisance actions include (1) enacting statutes that expressly authorize conduct that would otherwise be considered a nuisance, (2) authorizing costs and attorney's fees for frivolous or unreasonable public nuisance suits, and (3) limiting public nuisance suits against agricultural operations in Right to Farm Laws. What follows in this Subpart is a discussion of various statutes that limit public nuisance actions that have been enacted in other states.

1. Statutes Authorizing Conduct That Would Otherwise Constitute a Public Nuisance

States can limit public nuisance actions by legislative authorization of conduct that would otherwise constitute a public nuisance. Several states have enacted laws declaring that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance."¹³⁷ These statutes protect activities conducted under the express authorization of the legislature from public nuisance actions.¹³⁸

However, such statutes barring nuisance suits for activities authorized by statute have a number of limitations. First, activities that are not expressly authorized by the legislature are not protected within the scope of these statutes. For example, in interpreting its statute,¹³⁹ the Supreme Court of California stated the following:

A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly

137. CAL. CIV. CODE § 3482 (West 1997); *accord* IDAHO CODE ANN. § 52-108 (2000); MONT. CODE ANN. § 27-30-101(2) (2005); OKLA. STAT. ANN. tit. 50 § 4 (West 2000); S.D. CODIFIED LAWS § 21-10-2 (2004); WASH. REV. CODE ANN. § 7.48.160 (West 1992).

138. Walker & Cottingham, *supra* note 36, at 372.

139. CAL. CIV. CODE § 3482 (West 1997).

conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury.¹⁴⁰

Courts have interpreted the Idaho,¹⁴¹ Montana,¹⁴² South Dakota,¹⁴³ and Washington¹⁴⁴ statutes similarly.

Second, the authorized activity “must be conducted in accordance with the legislative authority” to bar a public nuisance action.¹⁴⁵ Thus, unlawful, wrongful, or negligent acts are not covered by these statutes.¹⁴⁶ Moreover, the Supreme Court of Washington has held that lawful actions may still constitute nuisances:

When a nuisance actually exists, it is not excused by the fact that it arises from a business or erection which is of itself lawful; and, even though an act or a structure was lawful when made or erected, if for any reason it later becomes or causes a nuisance, the legitimate character of its origin does not justify its continuance as a nuisance.¹⁴⁷

140. *Hassell v. City & County of San Francisco*, 78 P.2d 1021, 1022–23 (Cal. 1938). The California Supreme Court reiterated this interpretation of section 3482 in *Varjabedian v. City of Madera*, stating, “[a] requirement of ‘express’ authorization embodied in the statute itself insures that an unequivocal legislative intent to sanction a nuisance will be effectuated, while avoiding the uncertainty that would result were every generally worded statute a source of undetermined immunity from nuisance liability.” 572 P.2d 43, 47 (Cal. 1977).

141. *Idaho v. Hanna Mining Co.*, 699 F. Supp. 827, 835 (D. Idaho 1987), *aff’d*, 882 F.2d 392 (9th Cir. 1989) (holding that section 52-108 of the Idaho Code provides protection against nuisance actions only where the activity is expressly authorized by statute).

142. *Curran v. Dep’t of Highways*, 852 P.2d 544, 547 (Mont. 1993) (finding no protection under section 27-30-101(2) of the Montana Code where activities were not expressly authorized by statute).

143. *Hedel-Ostrowski v. City of Spearfish*, 2004 SD 55, ¶ 13, 679 N.W.2d 491, 496–97 (“The [South Dakota] legislature exempts from the definition of nuisance those things done or maintained under statutory authority.”).

144. *Miotke v. City of Spokane*, 678 P.2d 803, 817 (Wash. 1984) (holding that section 7.48.160 of the Washington Code “insulates acts performed under express statutory authority from actions for nuisance”).

145. *Walker & Cottingham*, *supra* note 36, at 373.

146. *Splinter v. City of Nampa*, 215 P.2d 999, 1004 (Idaho 1950); *Barnes v. City of Thompson Falls*, 1999 MT 77, ¶ 26, 979 P.2d 1275, ¶ 26 (“[A] statutorily authorized activity . . . cannot be a nuisance unless the plaintiff can show: (1) that the defendant completely exceeded its statutory authority, resulting in a nuisance; or (2) that the defendant was negligent in carrying out its statutory authority, resulting in a qualified nuisance.”).

147. *Grundy v. Thurston County*, 117 P.3d 1089, 1092 n.5 (Wash. 2005) (quoting 66 C.J.S. *Nuisances* § 15 (1998)); *see also* *Venuto v. Owens-Corning Fiberglas Corp.*, 99 Cal. Rptr. 350, 359 (Ct. App. 1971) (“[A]lthough an activity authorized by statute cannot be a nuisance, the *manner* in which the activity is performed may constitute a nuisance.”).

Finally, although a legislature can expressly authorize activities that might otherwise be a nuisance, it cannot do so if the public health, safety, or morals would be endangered as a result.¹⁴⁸ Indeed, in *Kelley v. Clark County*, the Supreme Court of Nevada held that because "[t]he suppression of nuisances injurious to public health or morals is among the most important duties of government," states cannot relinquish all authority in matters of public health, safety, and morals.¹⁴⁹ Similarly, the Supreme Court of Georgia stated in *Thrasher v. City of Atlanta* that "[i]t is extremely doubtful . . . [that] the Legislature has the power to authorize the doing of a thing which in its nature would tend to destroy or to impair materially the morals, the health, or the safety of the people."¹⁵⁰

In summary, a number of states have enacted statutes barring nuisance suits against activities expressly authorized by statute. Such statutes are limited to actions expressly permitted by law, and the authorized activities must be conducted lawfully and in such a manner that the public health, safety, or morals are not endangered.

2. Statutes Awarding Costs and Attorney's Fees for Frivolous Nuisance Suits Brought by the State

Another approach that legislatures employ to restrict public nuisance actions is to impose litigation costs on the State when it brings frivolous nuisance actions. For example, section 60.05(5) of the Florida Statutes provides that in actions brought in the name of the State by the attorney general, a state attorney, or other state agencies, costs and

148. 58 AM. JUR. 2D *Nuisances* § 448 (2002).

149. 127 P.2d 221, 223 (Nev. 1942). In *Kelley*, Clark County commissioners declared brothels in Las Vegas a public nuisance, ordering their abatement. *Id.* at 221–22. The court considered whether the City of Las Vegas's power to regulate brothels superceded the county's power to abate brothels as a public nuisance. *Id.* at 222. The court sided with the county, finding that the state could not relinquish all authority in matters concerning the public health, safety, and morals, and thus holding that the city's power to regulate brothels did not supplant the county's authority under state law to abate public nuisances. *Id.* at 223–24.

150. 173 S.E. 817, 821 (Ga. 1934) (quoting *Towaliga Falls Power Co. v. Sims*, 65 S.E. 844, 847 (Ga. Ct. App. 1909)). In *Thrasher*, a homeowner who lived near a city-controlled airport brought an action alleging that dust emitting from the airport constituted a public nuisance. *Id.* at 818–19. The city operated the airport under statutory authority. *Id.* at 819. The court found that the dust constituted a public nuisance because the legislature's express authorization of the airport did not give the city permission to operate it negligently. *Id.* at 823–24 ("[O]ne cannot be forced to endure [dust] from the negligence of another even though the business from which it springs may be expressly authorized by law.").

attorney's fees may be imposed against the State "if the court finds either before or after trial that there was no reasonable ground for the action[] and if judgment is rendered for the defendant."¹⁵¹

Washington has a similar statutory provision for costs. Section 4.84.170 of the Revised Code of Washington provides that "[i]n all actions prosecuted in the name . . . of the state, . . . the state . . . shall be liable for costs . . . to the same extent as private parties."¹⁵² Citing this statute, the Supreme Court of Washington held in *State ex rel. Carroll v. Gatter* that costs could be awarded against the State in a dismissed nuisance abatement action.¹⁵³

In contrast, other states that have statutory provisions to award costs for frivolous nuisance suits award costs only in actions filed by private citizens. For example, section 600.2425(1) of the Michigan Compiled Laws provides that if a private citizen brings an action to abate a public nuisance "and the court finds that there was no reasonable . . . cause for the action, costs may be taxed against" the private citizen.¹⁵⁴ Statutes in Mississippi¹⁵⁵ and Idaho¹⁵⁶ also have similar provisions.

Thus, while some states statutorily provide for litigation costs against States that bring frivolous lawsuits, other states award costs only when the frivolous nuisance action is filed by a private citizen.

3. Limits on Public Nuisance Suits in State Right to Farm Laws

Yet another means for a state to restrict public nuisance actions is to incorporate limitations on public nuisance suits against agricultural operations into the state's Right to Farm Law. Indeed, while current Wisconsin law provides minimal protection to agricultural operations against public nuisance actions,¹⁵⁷ Right to Farm Laws in a number of states limit such actions. For example, section 42-04-02 of the North Dakota Century Code provides that, in general, agricultural operations that were not nuisances when the operation began are not public nuisances:

An agricultural operation is not, nor shall it become, a

151. FLA. STAT. ANN. § 60.05(5) (West 2006).

152. WASH. REV. CODE ANN. § 4.84.170 (West 2006).

153. 260 P.2d 360, 364 (Wash. 1953).

154. MICH. COMP. LAWS ANN. § 600.2425(1) (West 2000).

155. MISS. CODE ANN. § 95-3-13 (2004).

156. IDAHO CODE ANN. § 52-411 (2000).

157. See *supra* Part III.A.3.

private or public nuisance by any changed conditions in or about the locality of such operation after it has been in operation for more than one year, if such operation was not a nuisance at the time the operation began; except that the provisions of this section shall not apply when a nuisance results from the negligent or improper operation of any such agricultural operation.¹⁵⁸

Similar language exists in the Right to Farm Statutes in other states, including Georgia,¹⁵⁹ New Mexico,¹⁶⁰ and North Carolina.¹⁶¹ These statutes generally provide that agricultural operations that were not nuisances when the operation began are not public nuisances unless there has been negligent or improper conduct, in which case a public nuisance action may be permissible.¹⁶²

In contrast, Right to Farm Laws in other states expressly allow for public nuisance actions, particularly when there is a threat to public health or safety. For instance, Pennsylvania's Right to Farm Law contains a specific provision that "nothing . . . [in the statute] shall in any way restrict or impede the authority of th[e] State from protecting the public health, safety and welfare or the authority of a municipality to enforce State law."¹⁶³ Texas also has a similar provision in its Right to Farm Law.¹⁶⁴

Another approach used by states is to create a presumption that an agricultural activity does not violate applicable laws and regulations, thus placing a burden on the State to demonstrate otherwise when pursuing a public nuisance action. For example, section 40.140(2) of the Nevada Statutes creates a presumption that agricultural activities consistent with good agricultural practices are reasonable.¹⁶⁵ The fact

158. N.D. CENT. CODE § 42-04-02 (1999).

159. GA. CODE ANN. § 41-1-7(c) (1997).

160. N.M. STAT. ANN. § 47-9-3(A) (LexisNexis 2006).

161. N.C. GEN. STAT. § 106-701(a) (2005).

162. *See, e.g.*, State v. Hafner, 1998 ND 220, ¶ 26, 587 N.W.2d 177, 183 (holding that an agricultural operation defense under section 42-04-02 of the North Dakota Century Code did not apply because allowing livestock to run freely off of farm property was negligent and improper).

163. 3 PA. CONS. STAT. ANN. § 954(a) (West 1995 & Supp. 2006).

164. TEX. AGRIC. CODE ANN. § 251.004(a) (Vernon 2004) ("This subsection does not restrict or impede the authority of this state to protect the public health, safety, and welfare or the authority of a municipality to enforce state law.").

165. NEV. REV. STAT. ANN. § 40.140(2) (LexisNexis 2002). This section does provide, however, that activities that have a "substantial adverse effect on the public health or safety" may constitute a nuisance. *Id.* § 40.140(2)(a).

that an agricultural activity “does not violate a federal, state or local law, ordinance or regulation” is sufficient to establish that the activity “constitutes good agricultural practice.”¹⁶⁶ Kansas,¹⁶⁷ Michigan,¹⁶⁸ and Utah¹⁶⁹ are among the states with this type of statutory provision.

In sum, unlike in Wisconsin where public nuisance actions are not barred against agricultural operations, Right to Farm statutes in a number of states provide that agricultural operations that were not nuisances when the operation began are not public nuisances. Yet another approach adopted in some states is to permit public nuisance actions while creating a presumption that agricultural operations in compliance with applicable laws and regulations are not nuisances.

Thus, while current Wisconsin law does not place significant restrictions on public nuisance actions, other states have employed various approaches to limit the scope and extent of such actions and to penalize frivolous public nuisance actions. The discussion in this Subpart of the methods employed by other states provides a useful backdrop for the discussion that follows in Part IV of this Comment, which considers the effectiveness and impact of the changes proposed to Wisconsin public nuisance law in Assembly Bill 278 and Senate Bill 425, and in Part V, which offers a recommendation for alternative legislation to limit public nuisance actions in Wisconsin.

IV. AN ASSESSMENT OF THE CHANGES TO WISCONSIN PUBLIC NUISANCE LAW PROPOSED IN ASSEMBLY BILL 278 AND SENATE BILL 425

The modifications to Wisconsin public nuisance law that were proposed in Assembly Bill 278¹⁷⁰ and Senate Bill 425¹⁷¹ would have imposed significant limits to state public nuisance actions. Indeed, the enactment of either item of legislation would have eliminated the State’s ability to bring common law public nuisance actions. This Part of the Comment provides an assessment of the proposed legislation, including an overview of the bills, a discussion of their legislative intent, and an analysis of their impact on Wisconsin public nuisance law.

166. *Id.* § 40.140(2)(b).

167. KAN. STAT. ANN. § 2-3202 (2001).

168. MICH. COMP. LAWS ANN. § 286.473(1) (West 2003).

169. UTAH CODE ANN. § 76-10-803(3) (2003).

170. Assemb. B. 278, 97th Leg., Reg. Sess. (Wis. 2005).

171. S.B. 425, 97th Leg., Reg. Sess. (Wis. 2005).

A. An Overview of Assembly Bill 278

Assembly Bill 278 was introduced by Assembly Speaker John Gard, Representative Jean Hundertmark, and Senator Joe Leibham in March 2005.¹⁷² In addition to its proposed modifications to public nuisance law, the bill, one of two bills in the "Job Creation Act Part Two,"¹⁷³ also included provisions to (1) permit tool and die manufacturers to place liens on customers,¹⁷⁴ (2) adopt the standard for expert testimony promulgated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹⁷⁵ and (3) repeal a law that imposes personal liability on shareholders of a corporation for amounts owed to the corporation's employees.¹⁷⁶ Assembly Bill 278 and its companion bill, Assembly Bill 277,¹⁷⁷ were introduced with the intent to "spur economic development by easing the state's regulatory environment."¹⁷⁸ Assembly Bill 278 failed to pass by the end of the 2005–2006 regular legislative session.¹⁷⁹

The bill contained two major modifications to Wisconsin public nuisance law. First, the bill would have prohibited the State from bringing an action under section 823.02 of the Wisconsin Statutes, and a county, city, village or town from bringing an action under section 823.01, "if the activity, use, or practice alleged to be a nuisance is not in violation of any statute, rule, permit, approval, or local ordinance or regulation."¹⁸⁰ Second, the bill would have required the court to "award

172. Press Release, Wis. State Sen. Joe Leibham, *supra* note 13.

173. *Id.*

174. Wis. Assemb. B. 278.

175. *State Assembly Advances "Daubert" Bill: Sweeping Rules of Evidence Changes Move to Senate*, CAPITOL UPDATE NEWSL. (State Bar of Wis., Madison, Wis.), Apr. 25, 2005, <http://www.wisbar.org/AM/Template.cfm?Section=Search&template=/CM/HTMLDisplay.cfm&ContentID=48722> (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)).

176. Wis. Assemb. B. 278.

177. Assemb. B. 277, 97th Leg., Reg. Sess. (Wis. 2005). Assembly Bill 277 contained provisions to (1) allow air permit holders to challenge emission limitations, (2) clarify that registration construction permits issued by the DNR do not expire, (3) clarify that general permits may act as construction and/or operation permits and (4) require the Department of Administration to issue a report regarding regulatory reform. Press Release, Wis. State Sen. Joe Leibham, *supra* note 13.

178. Stacy Forster, *Assembly Bills Seek to Boost Economy: Approved Measures Would Ease Regulations*, MILWAUKEE J. SENTINEL, Apr. 13, 2005, at 1D.

179. See History of Assemb. B. 278, 97th Leg., Reg. Sess. (Wis. 2005), available at <http://www.legis.state.wi.us/2005/data/AB278hst.html>. The last general business floorperiod for the 2005–2006 Wisconsin Legislature ended on May 4, 2006. S.J. Res. 1, 97th Leg., Reg. Sess. (Wis. 2005) (listing bills and resolutions adversely disposed of due to the end of the last general business floorperiod).

180. Wis. Assemb. B. 278. An amendment proposed in October 2005 would have limited only the State from bringing such actions. Assemb. B. 278, S. Amend. 1, 97th Leg.,

litigation expenses to the defendant in any action brought under s[ections] 823.01 or 823.02 in which the court finds that the defendant's activity, use, or practice that was alleged to be a public nuisance was not a public nuisance."¹⁸¹

B. An Overview of Senate Bill 425

Senator Dave Zien and Representative Scott Suder introduced Senate Bill 425 in November 2005.¹⁸² The bill, called the "Fairness in Litigation Act," was introduced to "protect private citizens against frivolous and unfair lawsuits brought forth by an Attorney General," and "to shield Wisconsin citizens and businesses against unfair lawsuits, which ultimately cost millions of dollars in economic development each year."¹⁸³

The public nuisance provisions in Senate Bill 425 were substantially similar to the changes to public nuisance law proposed in Assembly Bill 278.¹⁸⁴ First, Senate Bill 425 contained a provision to prevent the attorney general from commencing and prosecuting a public nuisance action "if the activity, use, or practice alleged to be a nuisance is not in violation of any statute, rule, order, permit, approval, or local ordinance or regulation."¹⁸⁵ Unlike Assembly Bill 278, however, the language in Senate Bill 425 did not bar counties, cities, villages, or towns from commencing such actions.¹⁸⁶

Second, like Assembly Bill 278, Senate Bill 425 contained a provision for litigation costs for frivolous nuisance suits brought by the State. Senate Bill 425 would have removed the current provision in section 823.02 of the Wisconsin Statutes that "[t]he same rule as to liability for costs shall govern as in other actions brought by the state."¹⁸⁷ In its place, the bill would have required the court to "award litigation

Reg. Sess. (Wis. 2005).

181. Wis. Assemb. B. 278.

182. S.B. 425, 97th Leg., Reg. Sess. (Wis. 2005).

183. Press Release, Sen. Dave Zien & Rep. Scott Suder, *supra* note 16. In addition to its provisions relating to public nuisance actions, Senate Bill 425 also contained provisions to prevent the Attorney General from (1) commencing civil actions against a party for an issue that is already the subject of another civil action without the approval of the governor or legislature, (2) joining in actions commenced by other states without the governor's approval, and (3) intervening in civil actions without the governor's or legislature's approval or without consent of all parties. Wis. S.B. 425.

184. Compare Wis. S.B. 425 with Wis. Assemb. B. 278.

185. Wis. S.B. 425.

186. Compare Wis. S.B. 425 with Wis. Assemb. B. 278.

187. Wis. S.B. 425.

expenses to the defendant in any action brought under . . . [current section 823.02] in which the court finds that the defendant's activity, use, or practice that was alleged to be a public nuisance was not a public nuisance."¹⁸⁸ While Assembly Bill 278 would have permitted litigation costs for frivolous actions brought under both sections 823.01 and 823.02, Senate Bill 425 would have provided for litigation costs only in actions brought under section 823.02.¹⁸⁹

Like Assembly Bill 278, Senate Bill 425 failed to pass by the end of the 2005–2006 regular legislative session.¹⁹⁰

*C. A Critique of the Changes to Wisconsin Public Nuisance Law
Proposed in Assembly Bill 278 and Senate Bill 425*

If enacted, either bill would have placed significant limits on the ability of the State to pursue public nuisance actions. First, the bills would have barred the State from pursuing nuisance actions for activities not in violation of statute, regulation, or ordinance. Moreover, the bills would have awarded litigation costs to defendants in public nuisance suits where the court determines the action is frivolous. The discussion in this section provides an assessment of the impact these provisions would have imposed on public nuisance law in Wisconsin.

1. An Assessment of the Proposal to Limit Public Nuisance Actions for Activities Not in Violation of Statute, Regulation, or Ordinance

Under current Wisconsin law, an activity may be considered a public nuisance even when it is not in violation of statutes, regulations, or ordinances.¹⁹¹ Indeed, Wisconsin currently permits actions against common law public nuisances.¹⁹²

The legislation proposed in Assembly Bill 278 and Senate Bill 425 would have eliminated State common law public nuisance actions in Wisconsin. Indeed, the bills, if enacted, would have barred the State from pursuing a nuisance action against activities not in violation of a statute, regulation, or ordinance. Thus, as critics have suggested, unregulated activities would have been completely immune from public

188. *Id.*

189. Compare Wis. S.B. 425 with Wis. Assemb. B. 278.

190. The last general business floorperiod for the 2005–2006 Wisconsin Legislature ended on May 4, 2006. See S.J. Res. 1, 97th Leg., Reg. Sess. (Wis. 2005).

191. See *supra* text accompanying notes 76–83.

192. *Id.*

nuisance actions in Wisconsin if either of these bills had been enacted.¹⁹³

The statutory language proposed in both bills was substantially different and had a significantly broader impact than language used by states that bar nuisance actions against activities expressly authorized by statute.¹⁹⁴ Indeed, statutes that declare that “[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance”¹⁹⁵ are limited in their scope as they apply only to activities expressly authorized by the legislature.¹⁹⁶ In contrast, the language proposed in Assembly Bill 278 and Senate Bill 425 would have applied to all activities not in violation of statutes, regulations, or ordinances.¹⁹⁷ Thus, the proposed legislation was significantly broader in scope than statutes in effect in other states in that it would have barred State nuisance actions against any activity not in violation of the law, regardless of whether that activity is expressly permitted or not.

As society and technology evolve, problems will arise if unregulated activities are not subject to public nuisance actions.¹⁹⁸ One critic of the proposed legislation has suggested that activities arising from new technology or from modifications to existing activities could create public nuisances that would go unabated.¹⁹⁹ Indeed, if statutes, regulations, and ordinances fail to keep up with rapidly changing technology, nuisances may be created by new activities resulting from technological advances that could not be abated through public nuisance actions.

To counter the potential problem of new activities creating

193. Press Release, Att’y Gen.’s Office, Lautenschlager: Legislation Being Rushed Through Process Without Public Scrutiny Would Compromise Public’s Right to Fight Environmental Public Nuisances (Mar. 31, 2005) (on file with author), *available at* http://www.doj.state.wi.us/news/2005/nr033105_ENV.asp; Written Testimony of 1000 Friends of Wis. to Senate Comm. on Judiciary, Corr. & Privacy Regarding Assembly Bill 278 (May 4, 2005) [hereinafter *Testimony of 1000 Friends*] (on file with author), *available at* http://www.1kfriends.org/Government_and_Policy/documents/1000FriendsTestimony.SenateHearingonAB278.5-4-05.doc.

194. *See supra* Part III.B.1.

195. *E.g.*, CAL. CIV. CODE § 3482 (West 1997); IDAHO CODE ANN. § 52-108 (2000); MONT. CODE ANN. § 27-30-101(2) (2005); OKLA. STAT. ANN. tit. 50 § 4 (West 2000); S.D. CODIFIED LAWS § 21-10-2 (2004); WASH. REV. CODE ANN. § 7.48.160 (West 1992).

196. *See supra* Part III.B.1.

197. Assemb. B. 278, 97th Leg., Reg. Sess. (Wis. 2005); S.B. 425, 97th Leg., Reg. Sess. (Wis. 2005).

198. *See* Memorandum from Bill O’Connor, Legislative Counselor, Wis. Ass’n of Lakes, to Senate Comm. on Judiciary, Corr. & Privacy (May 4, 2005) (on file with author), *available at* <http://www.wisconsinlakes.org/Bills/AB-278Testimony.pdf>.

199. *Id.*

unabatable nuisances, legislators and regulators may be incentivized to over-regulate in order to cover every current or future activity with the potential to create a nuisance.²⁰⁰ As a result, one of the legislation's purposes, to "spur economic development by easing the state's regulatory environment,"²⁰¹ could ultimately be frustrated.

Another issue with the limits on public nuisance actions proposed by Assembly Bill 278 and Senate Bill 425 is that the bills would have relinquished the State's authority to suppress nuisances arising from unregulated activities that injure the public health. It has been suggested that a State cannot permissibly relinquish this authority.²⁰² Indeed, in *State v. Sensenbrenner*, the Supreme Court of Wisconsin stated that "the legislature cannot surrender or limit police powers of the state," and indicated that to do so would be unconstitutional.²⁰³ Thus, had it been enacted, the proposed legislation may have impermissibly compromised the State's ability to exercise its police power.

Proponents of the legislation argue that its benefit is that it clarifies expectations of conduct for individuals and business and provides them with assurance that compliance with applicable laws will shield them from the threat of nuisance suits.²⁰⁴ However, as will be discussed in Part V of this Comment, there are other means to achieve this end that do not have as broad of an impact.

2. An Assessment of the Proposal to Award Litigation Costs for Frivolous Public Nuisance Actions

The legislation proposed by Assembly Bill 278 and Senate Bill 425

200. *Testimony of 1000 Friends*, *supra* note 193.

201. Forster, *supra* note 178.

202. 58 AM. JUR. 2D *Nuisances* § 448 (2002); *see also supra* text accompanying notes 149–50.

203. 262 Wis. 118, 124, 53 N.W.2d 773, 776 (1952). In *Sensenbrenner*, a beaver dam located on Sensenbrenner's property was blocking a navigable outlet stream. *Id.* at 119, 53 N.W.2d at 773–74. The State of Wisconsin alleged that the beaver dam constituted a public nuisance. *Id.* A provision of the Wisconsin Statutes required that beaver dams could not be removed without landowner consent. *Id.* at 123–24, 53 N.W.2d at 776. Landowners who failed to give consent assumed liability for any damages resulting from the dam's continued existence. *Id.* The court found that construing the statute to mean that "the state had abdicated its police power to . . . remove a beaver dam obstructing a navigable stream . . . would be unconstitutional because the legislature cannot surrender or limit police powers of the state." *Id.* at 124, 53 N.W.2d at 776.

204. Memorandum from James Buchen, Wis. Mfrs. & Commerce, to Wis. State Assembly (April 11, 2005) (on file with author), *available at* <http://www.wmc.org/GovernmentAffairs/display.cfm?ID=954>.

would have awarded litigation costs to defendants in public nuisance suits where the court determines the activity alleged to be a public nuisance is not a public nuisance.²⁰⁵ There is precedent in other states for such legislation; similar general provisions awarding costs for public nuisance actions brought by the State are in place in at least two other states.²⁰⁶

A statutory scheme in which litigation costs are awarded for a frivolous nuisance action would provide defendants to such actions with some assurance that only truly valid public nuisance actions will be litigated by the State. Moreover, defendants would have some assurance that when a frivolous suit is filed, their costs to defend the action are recoverable.

However, the threat of litigation costs for a frivolous suit may also deter the State from filing nuisance suits on unregulated activities. Because there are no statutes or regulations governing such activities, there is a higher risk that a court would not find that the activity alleged to be a nuisance constituted a nuisance. Thus, the State may be reluctant to pursue such actions where the probability of success is low or uncertain. In turn, some valid yet high risk public nuisance actions may not be litigated, leaving the resulting public nuisance unabated.

In addition, the actual impact of a provision that would award litigation expenses for frivolous suits is questionable. Indeed, according to Attorney General Lautenschlager's office, "not a single nuisance lawsuit brought by the Attorney General has been found to be frivolous Since the 1970s, Attorneys General have filed less than ten nuisance actions. None have been found to be frivolous."²⁰⁷

Moreover, the deterrence impact of the legislation is questionable. Even without the legislation, the attorney general's office is likely reluctant to incur costs to pursue low-probability nuisance suits. Thus, it is unlikely that the threat of attorney's fees will deter frivolous actions to a measurable degree.

In sum, there is precedent for awarding litigation costs for frivolous nuisance suits in other states, and such legislation would provide assurances to potential defendants that their costs to defend frivolous actions will be recovered. However, a statute awarding costs may deter valid actions against unregulated nuisances. Moreover, the need for a

205. Assemb. B. 278, 97th Leg., Reg. Sess. (Wis. 2005); S.B. 425, 97th Leg., Reg. Sess. (Wis. 2005).

206. See *supra* Part III.B.2.

207. Press Release, Att'y Gen.'s Office, *supra* note 20.

provision awarding costs is questionable, as no State public nuisance actions in recent history have been found to be frivolous.

This Part of the Comment has identified a number of problems with the changes to Wisconsin public nuisance law proposed in Assembly Bill 278 and Senate Bill 425. To remedy these problems, Part V of this Comment proposes alternative legislation that would achieve the legislative goal of protecting individuals and businesses from unfair public nuisance actions while protecting the interests of public health and safety.

V. AN ALTERNATIVE APPROACH FOR LIMITING PUBLIC NUISANCE ACTIONS IN WISCONSIN

This Part offers a proposal for alternative legislation to restrict public nuisance actions in Wisconsin. If the legislature determines it necessary to limit the State's ability to bring public nuisance actions, this proposal suggests a balanced approach that would protect the interests of the public while also shielding individuals and businesses acting lawfully from unfair public nuisance actions. Moreover, this proposal would provide increased clarity to Wisconsin public nuisance law.

First, Wisconsin should enact a statutory definition of a public nuisance. Because there is no definition of a public nuisance in Chapter 823 of the Wisconsin Statutes today, individuals must seek out such a definition in case law.²⁰⁸ A statute providing a clear definition of a public nuisance would ensure that Wisconsin citizens and businesses are provided adequate notice about what a public nuisance is and what types of activities and conditions constitute a public nuisance. A statutory definition of a public nuisance in Wisconsin should be declaratory of the common law definition currently in effect in the state, namely, that a public nuisance is "[c]onduct which interferes with the use of a public place or with the activities of an entire community."²⁰⁹ Although such a statutory definition would not change the definition of a public nuisance in Wisconsin, it would arguably make it easier for individuals and businesses to determine what activities constitute a public nuisance so that they can act lawfully.

Second, Wisconsin should adopt a statute similar to those already in effect in other states declaring that "[n]othing which is done or maintained under the express authority of a statute can be deemed a

208. See *supra* text accompanying note 76.

209. Seavey, *supra* note 43, at 984, quoted in *Schiro v. Oriental Realty Co.*, 272 Wis. 537, 546, 76 N.W.2d 355, 359 (1956).

nuisance.”²¹⁰ Such a statute would bar nuisance actions for activities expressly permitted by Wisconsin statutes and regulations.²¹¹ The wording of this proposed statute would enable legislators to overcome some of the problems in the language of Assembly Bill 278 and Senate Bill 425.²¹² Specifically, the proposed statute would continue to permit public nuisance actions against unregulated activities, thus maintaining the State’s ability to exercise its police power.

Finally, the Wisconsin Legislature should consider providing clearer direction in the Right to Farm Law regarding public nuisances. If the legislature wants to provide express protection to agricultural operations against public nuisance actions, it could modify the Right to Farm Law to specifically bar public nuisance actions. To avoid impermissibly compromising the State’s ability to exercise its police power, the legislature should continue to permit public nuisance actions against agricultural operations where there is a substantial threat to public health or safety. In doing so, the legislature could adopt an approach used by other states and create a presumption that an agricultural activity does not violate applicable laws and regulations and is reasonable. This approach would increase the burden on the State to demonstrate otherwise when pursuing a public nuisance action against agricultural operations.

If enacted by the legislature, these proposed limits to Wisconsin public nuisance law would achieve many of the objectives of Assembly Bill 278 and Senate Bill 425. Indeed, the limits proposed in this Comment would clarify what activities constitute a public nuisance. Moreover, this proposal would ensure that individuals and businesses acting under the express authority of law would be shielded from public nuisance actions. In turn, modification of the Right to Farm Law would provide even further clarity and protection to owners of agricultural operations.

VI. CONCLUSION

Public nuisance law is complex, confusing, and often controversial, and the law of public nuisance in Wisconsin is no exception. Despite the final outcome of Assembly Bill 278 and Senate Bill 425, the debate over

210. See CAL. CIV. CODE § 3482 (West 1997); accord IDAHO CODE ANN. § 52-108 (2000); MONT. CODE ANN. § 27-30-101(2) (2005); OKLA. STAT. ANN. tit. 50 § 4 (West 2000); S.D. CODIFIED LAWS § 21-10-2 (2004); WASH. REV. CODE ANN. § 7.48.160 (West 1992).

211. See Walker & Cottingham, *supra* note 36, at 372.

212. See *supra* Part IV.C.1.

what statutory controls, if any, should limit the State's ability to pursue public nuisance actions is unlikely to be resolved in the near future.

This Comment has suggested some less-limiting alternatives to the restrictions on public nuisance actions proposed in Assembly Bill 278 and Senate Bill 425. If enacted, these recommendations could effectively control state public nuisance actions while ultimately providing more clarity to nuisance law in Wisconsin.

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